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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TOOL TOURING, INC., et al.,

Defendants, Cross-complainants  
and Appellants,

v.

THE AMERICAN INSURANCE  
COMPANY,

Cross-defendant and Respondent.

B230136

(Los Angeles County  
Super. Ct. No. BC 371155)

APPEAL from orders of the Superior Court of Los Angeles County.

Gregory W. Alarcon, Judge. Reversed.

McPherson Rane, Edwin F. McPherson and Tracy B. Rane; Jenner & Block, Jerold Oshinsky and Mary Craig Calkins for Defendants, Cross-Complainants and Appellants.

Hager Dowling Lim & Slack, John V. Hager and Michael L. Bean for Cross-Defendant and Respondent The American Insurance Company.

Munro Smigliani & Jordan, R. Michael Jordan and David M. Plouff as Amicus Curiae on behalf of Plaintiff and Cross-Defendant Clarendon National Insurance Company.

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Tool, a rock band, was formed in approximately 1990; its members are Adam Jones, Maynard James Keenan, Danny Carey and Justin Chancellor; Tool is a partnership, and Tool Dissectional, LLC and Tool Touring, Inc. are the corporate entities through which the band conducts its business (the named insureds; collectively Tool). The American Insurance Company (AIC) and Clarendon National Insurance Company (Clarendon) issued entertainment insurance policies to Tool.

In the underlying action, Cameron De Leon (and his corporation) sued Tool for copyright infringement of his artwork and defamation. Clarendon agreed to defend Tool under a reservation of rights. During the pendency of the underlying action, Clarendon filed a complaint against Tool and Doe insurance defendants for declaratory relief and related causes of action. Then Tool filed a cross-complaint against Clarendon for breach of contract and related causes of action. Tool later filed amended cross-complaints adding AIC and St. Paul Fire and Marine Insurance Company (St. Paul) as cross-defendants. After a series of orders and rulings, the trial court found AIC did not have a duty to defend the underlying action. Tool contends AIC had a duty to defend under the AIC policy (Policy). Tool also challenges the court's orders relating to its motion for leave to file another amended cross-complaint. We reverse.

## **FACTUAL AND PROCEDURAL SYNOPSIS**

### *I. Tool*

In addition to performing, writing and recording music, Tool also creates and sells various merchandise for profit such as T-shirts, posters, hats, stickers, keychains and sweatshirts. Tool advertises its own merchandise for sale. All of the merchandise sold by Tool contains artwork. Tool displays and sells its posters, T-shirts and other merchandise at its live concerts.

Tool's merchandise is advertised and sold on the band's website. Tool displays artwork throughout its website, including some of the artwork at issue in the underlying

action. The website also contains news and other sections, including a biography section about the band members, and displays photos. The website is specifically designed to advertise the band and its merchandise. The members of Tool do not manage the website; the website is managed and maintained by Tool's management company, its business management company and certain independent contractors.

Tool merchandise also is sold directly by retail outlets throughout the United States. Tool has an agreement with FEA, Inc., pursuant to which FEA causes Tool merchandise to be distributed to various places and retail outlets, including Hot Topic and Rock America.

## *II. Underlying Action*

On July 15, 2005, De Leon filed the underlying action against Tool and others. De Leon is a graphic artist who created or refined several works of art for Tool from 1991 through 2002. The operative complaint is the fifth amended complaint (FAC). Although De Leon was paid for all such work, he never signed a work for hire agreement; therefore, he claimed he owned the copyright to those works.

### *A. Copyright Allegations*

Essentially, De Leon alleged: (1) De Leon created at least 10 works of visual art for Tool; (2) whatever oral or implied copyright licenses were granted to Tool for these works were revocable and limited in time and scope; (3) Tool exceeded that time and scope; (4) De Leon revoked all such licenses; and (5) Tool continued to use the works in violation of federal copyright laws.

Specifically, De Leon alleged:

1. De Leon created the Tool "Wrench" logo for promotional fliers and T-shirts, to be used by Tool "for a reasonable period of time" pursuant to a gratis license, but Tool "exceeded the scope of such license [and therefore infringed his copyrights] . . . by greatly exceeding a reasonable time period for the exploitation of the same" and by improperly using the Wrench logo "in numerous other forms of [unauthorized] merchandise, e.g., underwear, keychains, hooded sweatshirts, stickers, etc." De Leon

further alleged Tool improperly sold stickers featuring the Wrench logo on Tool's website.

2. Tool used his other copyrighted works, including "Ocular Orifice," "Smoke Box," "Gnats," "Two Hands," and "Salival Figure," in connection with Tool's merchandise, on album covers, in its videos, on its website and during its concerts.

3. "In 2002, in connection with Tool's 'Lateralus' album, De Leon created certain works of visual art for promotional use in the 'Schism' music video including but not limited to the major characters and sets, and painstakingly painted the actors/models to depict these creations."

4. "To the extent De Leon granted Tool a limited license to use certain visual images for the band's third album cover 'Aenima' including the pieces 'Ocular Orifice,' 'Smoke Box,' and 'Gnats', Tool and its licensees have exploited these images in a number of other and different ways including but not limited to merchandise."

5. De Leon further alleged that he "created the pieces 'Salival Figure' and 'Two Hands' for the 'Salival' box cover" and that "Tool and its licensees exceeded the scope of said license, if any, by exploiting said words in many ways including, inter alia, t-shirts featuring 'Two Hands.'"

6. Tool "failed to disclose all of the ways in which they used and/or exploited the De Leon Art . . . Furthermore, [De Leon] believes that he is still to date unaware of the full extent of [Tool's] infringing conduct/use of De Leon art."

7. "On or about June 15, 2005, Plaintiff (through counsel of record) sent correspondence to Tool, Satellite Artist Management, Inc., Hot Topic and Tool's agents FEA, Inc., terminating all revocable licenses that were conceivably given by De Leon and notifying these parties of the limited scope of licenses, if any, that were previously given."

In addition to the alleged uses of his artwork set forth in the complaint, AIC submitted a declaration from De Leon stating that Tool had infringed 18 of his copyrighted works with 47 known, separate uses on T-shirts, fliers, album covers, hats,

stickers, pendants, sweatshirts, boxer shorts, patches, music videos, keychains and on Tool's website.

### *B. Other Allegations*

Although the FAC contained no claim for defamation, De Leon alleged Tool defamed him during the Policy period in connection with other claims in that:

The Tool defendants made misrepresentations to third parties concerning De Leon which disparaged and defamed De Leon and which caused Hot Topic to cease doing business with De Leon.

Other derogatory statements concerning De Leon were made by the Tool defendants to Hot Topic, the content of which has not yet been ascertained, but which disparaged and defamed De Leon and which caused Hot Topic to cease doing business with De Leon.

Other derogatory statements concerning De Leon were made by Tool defendants to third parties, the content of which has not yet been ascertained, but which disparaged and defamed De Leon and which caused third parties to cease doing business with De Leon.

Also, De Leon alleged he lost the use of "at least three (3) of [his] original creations," which "were never returned to him by Tool, including the 'Wrench' logo, 'Novus Opiate Seclorum,' and 'Medicine Man.'"

### *III. The AIC Entertainment Insurance Policy*

The Policy covered the period of August 23, 2002, through August 23, 2003. The Policy consists of 171 pages. Tool purchased the Policy to protect its business, which was disclosed in the application as "SHELL/TOURING ENTERTAINER." The Policy provided general liability coverage for "property damage" caused by an "occurrence."

#### *A. Coverage A (bodily injury and property damage coverage)*

Coverage A provides in part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages.

“Property damage” is defined as:

(a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or (b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

An “occurrence” is defined as:

[A]n accident, including continuous or repeated exposure to substantially the same harmful conditions.

*B. Coverage B (personal and advertising injury coverage)*

Coverage B provides in part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages.

“Personal and advertising injury” is defined as:

[I]njury, including consequential bodily injury arising out of one or more of the following offenses: [¶] . . . (d) Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organizations goods, products, or services; [¶] . . . . (f) The use of another’s advertising ideas in your advertisement; or (g) Infringing upon another’s copyright, trade dress or slogan in your advertisement.

“Advertisement” is defined as:

[A] notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition: [¶] (a)

Notices that are published include material placed on the Internet or on similar electronic means of communication; and [¶] (b) Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

### *C. Exclusions*

The Policy contained an entertainment industry exclusion (EIE), which provided:

This policy does not apply to Personal Injury or Advertising Injury arising out of the development, pre-production, production, post-production, distribution, exploitation, or exhibition of motion pictures, television programs, radio programs, documentary films, industrial films, commercial films, educational films, training films, stage plays, video cassettes, audio cassettes, music, musical recordings, sheet music, lyrics, scripts, manuscripts, books or other similar materials and properties.

The Policy also contained an exclusion for material published prior to the policy period, which stated:

Personal and advertising injury arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

## *IV. Pleadings and Motions*

### *A. Pleadings*

Tool's broker provided notice of the underlying action to Clarendon, another of Tool's insurers, on November 8, 2005. Clarendon agreed to provide Tool with a defense under a reservation of rights. On January 17, 2007, Tool tendered its defense to AIC. On June 20, 2007, AIC denied coverage.

In May 2007, during the pendency of the underlying action, Clarendon filed a complaint against Tool and Doe insurance defendants seeking declaratory relief, reimbursement, equitable indemnity, equitable contribution and equitable subrogation.

On June 22, 2007, Tool filed a cross-complaint against Clarendon alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory

relief. Tool later filed a first amended cross-complaint to add AIC as a cross-defendant and a second amended cross-complaint (SACC) to add St. Paul as a cross-defendant.

*B. Summary Judgment/Summary Adjudication Motions*

In October 2008, Clarendon, AIC and Tool each filed a motion for summary judgment. Clarendon and AIC argued they had no duty to defend. In May 2009, the court denied each motion. In denying Clarendon's motion, the court found a potential for coverage existed under coverage A<sup>1</sup> based on De Leon's allegations for the loss of use of three of his works of art. The court noted: "Here the policy at issue covers property damage or the loss of use of tangible property that is not physically injured. In the underlying suit, DeLeon prayed for the return of three of his works of art. [¶] There is an exclusion for intentional or deliberate conduct, but whether Tool intentionally acted or not cannot be determined because Clarendon failed to meet its burden that the conduct was intentional or deliberate. Therefore a potential for coverage existed under Coverage 'A' of the policy." (Citations omitted.)

Although the court ruled there was a potential for coverage under Coverage A, the court denied Tool's motion for summary adjudication, stating, "There is insufficient evidence to even show that there was the loss of use of tangible property." With respect to Coverage B, the court found there was a triable issue as to whether Clarendon had a duty to defend under Coverage B because it was up to the trier of fact to determine whether the alleged copyright infringement occurred in Tool's advertisement. The court found there was a genuine dispute regarding whether there was a potential for coverage under the AIC Policy.

In 2010, St. Paul filed a motion for summary judgment, and Tool filed a motion for summary adjudication (solely on the issue of whether St. Paul had a duty to defend Tool in the underlying action). In September, the court denied St. Paul's motion and granted Tool's motion.

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<sup>1</sup> Coverage A and Coverage B in the Clarendon policy are identical to the coverage provided in Coverage A and Coverage B of the AIC Policy.



In granting Tool's motion, the court determined that as a matter of law, St. Paul was obligated to defend Tool because, among other things, the defamation allegations were sufficient to establish a potential for coverage. Additionally, the court held St. Paul owed Tool a duty to defend with respect to the advertising injury offense because of De Leon's copyright infringement allegations with respect to Tool's fliers and merchandise. Although St. Paul argued coverage was excluded by the field of entertainment exclusion, the court rejected that argument because, "De Leon alleged that Tool used his works of art in much more than Tool's entertainment ventures and on other products than just CDs, [videos], and DVDs."

*C. Motion for Leave to Amend*

On August 18, 2009, St. Paul demurred to Tool's SACC. After taking the demurrer under submission, the court sustained the demurrer and ordered Tool to file a third amended cross-complaint (TACC) within 10 days, which would have been November 30, 2009, the Monday after Thanksgiving, and to file entire copies of all insurance policies with any amended cross-complaint.

According to Tool, the court clerk sent the minute order by regular mail, but only to counsel for St. Paul. Counsel for Tool did not receive a copy of the minute order until November 24, two days before Thanksgiving. Tool's counsel was due to commence a six-week jury trial on the Monday the amended pleading was due.<sup>2</sup>

While the demurrer was pending, Tool discovered the existence of another insurer, National Surety Corporation, which should have provided coverage in the underlying action, and also additional facts supporting new bad faith allegations against AIC. As those facts went beyond the leave granted by the court, counsel felt another motion for leave to amend was necessary and filed a motion for leave to file a TACC.

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<sup>2</sup> These facts and some others are not supported by a citation to the record. Counsel is reminded that California Rules of Court, rule 8.204(a)(1)(C) (all rule references are to the California Rules of Court) requires that all references to matters in the record be supported by citation to the record; matters include references to motions and court orders. Notice for this ruling was waived.

On January 22, 2010, the court denied the motion for leave to amend, stating Tool had failed to explain why it had not filed a TACC within the 10 days, as ordered, and why it had not then immediately sought leave to file a fourth amended cross-complaint.

On January 27, St. Paul filed an ex parte application to dismiss Tool's entire cross-complaint against it on the ground there was no operative cross-complaint on file. The court dismissed the cross-complaint against St. Paul.

*D. Motion for Relief*

On February 2, 2010, Tool filed a motion for relief, pursuant to Code of Civil Procedure section 473, from the order dismissing St. Paul from the cross-action and seeking leave to file a TACC.

In her declaration, counsel for Tool stated that instead of filing the TACC, she had decided the appropriate course of action would be to file a motion for leave to amend with a proposed TACC addressing the issues mandated by the court and adding the newly discovered allegations and a new cross-defendant. Counsel stated that due to a calendaring error and counsel's impending jury trial, the motion was not filed until December 2, two days after the court's deadline for filing the amended cross-complaint.

On March 2, the court granted Tool's motion with respect to the claim for declaratory relief against St. Paul because that claim had not been the subject of St. Paul's original demurrer. The court denied the motion with respect to the other two claims against St. Paul and denied the request for leave to add a new party and additional claims. According to the court, Tool should have filed a motion for reconsideration of the order denying leave to amend. According to Tool, there were no new facts or changes in the law that would have satisfied the statutory basis for a motion for reconsideration.

*E. Duty to Defend*

According to Tool, in September 2010, the court ordered that the trial would be bifurcated, stating the first part would be conducted by AIC, Clarendon and Tool filing briefs on the issue of the duty to defend, which the court would determine. After briefs

were filed, a hearing was held, and the matter was taken under submission. The court issued an order on December 9, 2010, ruling AIC did not have a duty to defend Tool.<sup>3</sup>

The court held that under Coverage B, there was no coverage for the copyright infringement and defamation allegations due to the EIE. Although Tool argued the De Leon complaint alleged that Tool used the De Leon works of art in much more than Tool's entertainment ventures, the court now ruled the paragraphs cited by Tool showed otherwise. The court specifically referenced paragraphs 18-20 of the De Leon complaint, in which De Leon alleged Tool used his works of art in connection with Tool's first public performance, for promotional fliers, and on T-shirts "for [Tool's] success, and for Tool's CDs, albums, and DVDs." (Citations omitted.) The court held that those purposes were still a part of Tool's general effort to develop, distribute, exploit or exhibit its music.

With respect to a duty to defend under Coverage A, the court acknowledged that paragraph 25 of the De Leon complaint contained allegations of loss of use of tangible property, which constituted "property damage" under the Policy, but then found that the loss of use claim with respect to the three original works of art was not caused by an "occurrence."

The court's ruling that AIC had no duty to defend effectively disposed of the case as it terminated each of Tool's causes of action. (See *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1101.) Tool filed a timely notice of appeal from the order finding AIC had no duty to defend. According to Tool, the court granted Tool's motion to stay the rest of the actions.

### **DISCUSSION**

Tool contends the copyright infringement claim and slander allegations in the underlying action triggered AIC's duty to defend under Coverage B of the Policy, the

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<sup>3</sup> According to Tool, the court did not issue any order concerning Clarendon's motion, and that action has been stayed pending the outcome of this appeal.

EIE exclusion did not bar coverage of those claims, and AIC had a duty to defend under Coverage A of the Policy due to the loss of use of property allegations.

### *I. Introduction*

In *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323-324, the court summarized the rules applicable to interpreting an insurance policy:

“The facts are undisputed. Thus, the interpretation of the [subject] insurance policy is a question of law, which we review de novo. [¶] Under the rules of policy interpretation, we look to the language of the contract to ascertain its plain meaning ‘or the meaning a layperson would ordinarily attach to it.’ We give effect to the mutual intent of the parties at the time the contract was formed, inferable if possible, from the written policy. Our interpretation is controlled by “[t]he ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage.’”

“‘[C]overage clauses are broadly construed in favor of the insured and express exclusions are strictly construed against the insurer. . . .’ In a declaratory relief action to determine the duty to defend, ‘the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.’

“ . . . .

“‘It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. This duty . . . is separate from and broader than the insurer’s duty to indemnify.’ “‘For an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. Hence, the duty ‘may exist even where coverage is in doubt and ultimately does not develop.’”

“By contrast, “‘where there is no possibility of coverage, there is no duty to defend. . . .’” . . . [¶] . . . [W]here the extrinsic facts eliminate the potential for coverage,

the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy.’ Hence, “‘the insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.’”

“‘[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy.’” (Citations & italics omitted.)

“To yield their meaning, the provisions of a policy must be considered in their full context. Where it is clear, the language must be read accordingly. Where it is not, it must be read in conformity with what the insurer believed the insured understood thereby at the time of formation and, if it remains problematic, in the sense that satisfies the insured’s objectively reasonable expectations.” (Citations omitted.) (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45.)

“Equally important are the requirements of reasonableness and context. First, ‘An insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable.’ ‘Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.’ Second, ‘[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.’ ‘There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an application.’” (Citations & italics omitted.) (*Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.)

## *II. Coverage B*

### *A. The Coverage*

Coverage B provides in part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages.

An “advertising injury” includes: an oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organizations goods, products, or services; the use of another’s advertising ideas in your advertisement; and infringing upon another’s copyright, trade dress or slogan in your advertisement.

Essentially, De Leon alleged: (1) De Leon created at least 10 works of visual art for Tool; (2) whatever oral or implied copyright licenses were granted to Tool for these works were revocable and limited in time and scope; (3) Tool exceeded that time and scope; (4) De Leon revoked all such licenses; and (5) Tool continued to use the works in violation of federal copyright laws.

In part, the Policy defined “advertisement” as, “[A] notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.” Generally “advertising” ““means widespread promotional activities directed to the public at large.”” ( *Rombe Corp. v. Allied Ins. Co.* (2005) 128 Cal.App.4th 482, 490.)

Tool asserts the allegations it used De Leon’s copyrighted logo and art work on its promotional fliers and other merchandise and on its website triggered the duty to defend because those allegations constituted an advertising injury. The band used De Leon’s logo and artwork on those items to advertise the band. (See e.g., *Underwriters at Lloyd’s of London v. Hunefeld* (1964) 230 Cal.App.2d 31, 39 [proper to consider the business of the insured when interpreting intent of words in insurance contract]; *Amway Distributors Benefits Ass’n v. Federal Ins.* (W.D.Mich. 1997) 990 F.Supp. 936, 945-947 [some of the uses of videotapes included advertising.]

The defamation allegations were: the Tool defendants made misrepresentations to third parties concerning De Leon which disparaged and defamed De Leon and which caused Hot Topic to cease doing business with De Leon. Other derogatory statements concerning De Leon were made by the Tool defendants to Hot Topic, the content of which has not yet been ascertained, but which disparaged and defamed De Leon and which caused Hot Topic to cease doing business with De Leon. Other derogatory statements concerning De Leon were made by Tool defendants to third parties, the content of which has not yet been ascertained, but which disparaged and defamed De Leon and which caused third parties to cease doing business with De Leon. These paragraphs all further alleged Tool made the sale of its merchandise contingent upon Hot Topic/third party terminating its business with De Leon.

Tool argues that the allegations it made defamatory statements regarding De Leon to third parties that caused third parties to cease doing business with De Leon triggered AIC's duty to defend as those allegations were made during the Policy period. (See *County of San Bernardino v. Pacific Indemnity Co.* (1997) 56 Cal.App.4th 666, 684 & fn. 12.) "[T]he duty to defend arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause of action pleaded by the third party." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510.)

De Leon's FAC contained allegations of copyright infringement and slander which triggered AIC's duty to defend as they potentially occurred during the Policy period, However, the court found "the EIE bars coverage for personal and advertising injury that arises out of the insured's field of entertainment, including music."

#### *B. The EIE Exclusion*

The EIE provided:

This policy does not apply to Personal Injury or Advertising Injury arising out of the development, pre-production, production, post-production, distribution, exploitation, or exhibition of motion

pictures, television programs, radio programs, documentary films, industrial films, commercial films, educational films, training films, stage plays, video cassettes, audio cassettes, music, musical recordings, sheet music, lyrics, scripts, manuscripts, books or other similar materials and properties.

The court found that the “arising out of” language of the EIE was triggered by “advertising or personal injuries that have only a minimal causal or incidental relationship to Tool’s development, distribution, exploitation, or exhibition of its music, CD’s, videos, and DVD’s.”

Tool contends the court disregarded the plain and ordinary meaning of “arising out of” and used an impermissibly broad interpretation to expand the reach of the exclusion as none of the properties on which Tool used the logo and artwork were listed in the EIE. In addition, Tool posits a reasonable person would not interpret “arising out of” as the court did because such an interpretation could mean virtually all claims against Tool would be excluded on the basis its primary business was music. Rather, Tool opines that the EIE relates to the creation of music, not collateral activities such as merchandising. Alternatively, Tool asserts that the EIE is ambiguous and should be construed in its favor and that the court’s interpretation renders the promise of coverage under Coverage B illusory. AIC counters the plain meaning of the EIE excluded coverage, the EIE was not ambiguous and that the EIE did not render the Policy illusory.

Noting that Tool admitted one of the main purposes it created and sold merchandise was to advertise its music and concerts, AIC contends its Policy excluded the FAC’s claims for copyright infringement and disparagement as they were incidentally related to Tool’s music. AIC posits that the phrase “or other similar materials or properties” in the EIE was designed to limit personal and advertising injury arising from Tool’s entertainment business as a whole not to limit the EIE to specific materials and properties.



AIC reasons the EIE extended to the defamation allegations because they arose from Tool's attempt to develop, distribute, exploit<sup>4</sup> and exhibit its music and notes Tool admitted bands often earn more revenue from the sale of merchandise than from the sale of CDs. AIC asserts those different sources of revenue each sought to do the same thing, i.e., to exploit Tool's music, which is what Tool was doing when it secured a merchandise contract with Hot Topic, and because Tool disparaged De Leon to secure that contract, that disparagement had an incidental relationship to Tool's exploitation of its music.

However, the FAC did not allege that Tool made defamatory statements to secure a contract. The evidence showed Tool had an agreement with FEA, not Hot Topic, to distribute Tool merchandise to places including Hot Topic.

“‘[I]f semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates.’ The purpose of this canon of construction is to protect the insured’s reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy. . . . ‘[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again, “any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect”; thus, “the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.”’” (Citations omitted.) (*Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 807-808.) “This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.” (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) “[A]n insurer that wishes to rely on an exclusion has the burden of proving, through conclusive evidence,

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<sup>4</sup> “Exploit” is defined as “1. To employ to the greatest possible advantage. 2. To make use of selfishly or unethically.” (American Heritage Dict. (2d college ed. 1985) p. 478.)

that the exclusion applies in all possible worlds.” (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1039.)

An exclusionary clause “““must be conspicuous, plain and clear.””” (Italics deleted.) (*MacKinnon v. Truck Ins. Exchange, supra*, 31 Cal.4th at p. 648.)

### *1. Conspicuous*

In analyzing whether an exclusion is conspicuous, we must consider the exclusion’s “actual placement in the actual physical policy that was presented to [the] insureds.” (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1209.) To the extent that by noting the EIE is one sentence in a 171-page policy Tool is suggesting the exclusion is not conspicuous, we disagree. The EIE is a separate page entitled, Coverage B: Personal and Advertising Injury Liability Entertainment Industry Exclusion. The EIE in this Policy was conspicuous. (See *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 719 [“[T]he exclusion must be positioned in a place and printed in a form which would attract a reader’s attention.”].)

### *2. Plain and Clear*

The question is whether the language of the EIE is plain and clear. (See *Ponder v. Blue Cross of Southern California, supra*, 145 Cal.App.3d at p. 723 [“An exclusion in an adhesion contract of insurance must be expressed in words which are ‘plain and clear.’ This means more than the traditional requirement that contract terms be ‘unambiguous.’ Precision is not enough. Understandability is also required. To be effective in this context, the exclusion must be couched in words which are part of the working vocabulary of average lay persons.”].) “The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert.” (*Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1209.) In other words, “[I]nsurance contracts -- and especially their exclusionary clauses -- must be expressed in language comprehensible to citizens of average education, knowledge and experience.” (*Ponder v. Blue Cross of Southern California, supra*, 145 Cal.App.3d at p. 724.)

““An insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.”” (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759.) “An insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected. Where the exclusion is clear, we will not rewrite the insurance contract to impose coverage where none was contemplated. However, an exclusion or limitation on coverage must be clearly stated and will be strictly construed against the insurer. If an exclusion ambiguously lends itself to two or more reasonable constructions, the ambiguity will be resolved against the insurer and in favor of coverage.” (Citations omitted.) (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.)

The phrase “arising out of” is interpreted differently depending on whether the phrase appears in a coverage clause or an exclusionary clause; the former is interpreted broadly so as to afford the greatest possible protection to the insured whereas as the later is interpreted narrowly so as to not take away coverage. (*State Farm Mut. Auto. Ins Co. v. Partridge* (1973) 10 Cal.3d 94, 101-102; accord *Charles E. Thomas Co. v. Transamerica Ins. Group* (1998) 62 Cal.App.4th 379, 383-384.)

Citing *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, AIC asserts that when the term “arising out of” is used, there needs to be only a minimal causal connection or incidental relationship between the type of coverage excluded and the actions contained in the exclusion. That court reasoned, “California courts have consistently given a broad interpretation to the terms ‘arising out of’ or ‘arising from’ in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.” (*Id.* at p. 328.) However, that case was looking at the term in an endorsement for additional coverage. (*Id.* at pp. 323-324.)

“The California courts generally have construed the term ‘arising out of’ as having broader significance and connoting more than causation. For example, our Supreme Court has explained that the ‘arising out of the use’ language in insuring clauses of automobile liability policies ‘has broad and comprehensive application, and affords coverage for injuries bearing almost any causal relation with the vehicle’; however, the court further explained that there must be ‘[s]ome minimal causal connection’ between the vehicle and the injury. Other cases have equated ‘arising out of’ with “. . . origination, growth or flow from the event.”” One federal court, applying California law to determine the scope of an exclusionary clause and the key concept of ‘arising from’ or ‘arising out of,’ stated: “‘Arising out of’ are words of much broader significance than ‘caused by’. They are ordinarily understood to mean “‘originating from” “having its origin in,” “growing out of” or “flowing from”” or in short, ‘incident to, or having connection with’ . . . .”” (Citations omitted.) (*Smith Kandal Real Estate v. Continental Casualty Co.*, *supra*, 67 Cal.App.4th at p. 419.) The court concluded the exclusion did not defeat coverage because the injury flowed from some ““independent act, or intervening cause wholly disassociated from, independent of and remote from”” the actions described in the exclusion. (*Ibid.*) At some point, the logical connection between the injury and the exclusion becomes too tenuous or attenuated for the injury to be excluded. (See *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.*, *supra*, 5 Cal.4th at pp. 872-873.)

In *Continental Cas. Co. v. City of Richmond* (9th Cir. 1985) 763 F.2d 1076, 1081, which was cited in *Bay Cities*, the court reasoned that a broad interpretation should be given to “arising from” in an exclusionary clause because as it was “even more strongly suggested here by the augmentation of ‘arising’ with the words ‘directly or consequentially.’ This language clearly implies that, to be excluded from coverage, a claim need be only slightly connected to one of the types of injury that is specifically identified for exclusion.” The EIE contains no such augmentary language.

Tool argues that the cases show the EIE relates to claims based on substantive content but not claims based on packaging or promotion and that the court's interpretation would mean all the coverage promised in Coverage B would be eliminated such that it would not have purchased the policy. Tool reasons that if only a minimum connection is needed, everything it does has a minimum connection to its music, thus rendering the policy illusory. Tool relies on two federal cases to support its argument.

In *Manzarek v. St. Paul Fire & Marine Ins. Co.* (9th Cir. 2008) 519 F.3d 1025, the court addressed the meaning of a field of entertainment limitation endorsement (FELE). Raymond Manzarek, a founding member of the classic rock group The Doors, Doors Touring, Inc. (DTI) and others were sued by a former member of The Doors, alleging they were liable for infringing on The Doors name, trademark and logo in conjunction with their planned tours; the underlying lawsuits included allegations of the improper use of The Doors logo in conjunction with the marketing of products and merchandise. (*Id.* at pp. 1027-1028.)

The FELE excluded coverage for the “advertising or publicizing for, any Properties or Programs which are within your Field of Entertainment Business.” (*Manzarek v. St. Paul Fire & Marine Ins. Co.*, *supra*, 519 F.3d at p. 1029.) The policies defined “Field of Entertainment Business” as: “The creation, production, publication, distribution, exploitation, exhibition, advertising and publicizing of product or material in any and all media such as motion pictures of any kind and character, television programs, commercials or industrial or educational or training films, phonograph records, audio or video tapes, CDs or CD ROMs, computer on-line services or internet or Web site pages, cassettes or discs, electrical transcriptions, music in sheet or other form, live performance, books or other publications.” (*Ibid.*)

The court determined there was a potential for coverage, noting the underlying lawsuits were silent about the type of products and merchandise produced and marketed, and reasoned: “California law requires us to adopt a narrow construction of the FELE. With such narrow construction, the FELE would not exclude advertising injury coverage

if, for example, Manzarek and DTI began distributing ‘The Door's Own’ line of salad dressing. Advertising injury coverage for such a product would still exist because Manzarek and DTI would not necessarily publicize, distribute, exploit, exhibit, or advertise in media such as motion pictures, etc. For similar reasons, the FELE would not completely exclude advertising injury coverage if Manzarek and DTI began marketing a line of t-shirts or electric guitars with The Doors logo or Morrison’s likeness on them. Although marketing these products would undoubtedly expose Manzarek and DTI to a claim for advertising injury, Manzarek and DTI would still enjoy advertising injury coverage under the Policies.” (Fn. & italics omitted.) (*Manzarek v. St. Paul Fire & Marine Ins. Co.*, *supra*, 519 F.3d at pp. 1032-1033.)

In *Vivid Video, Inc. v. North Am. Specialty Ins. Co.* (C.D. Cal 1999) 1999 U.S. Dist. Lexis 15322, the plaintiff (Vivid), a producer, marketer and distributor of adult entertainment videos, was sued for various claims including federal trademark infringement. Vivid sought a defense under its CGL policy, but the insurer refused to defend partly on the basis an EIE excluded advertising injury “arising out of” the field of entertainment business of the insured. (*Id.* at pp. 1-3.) In granting summary adjudication for Vivid, the court held that the EIE did not eliminate the duty to defend because, “The Endorsement’s plain language supports an interpretation that it excludes only injuries an insured might suffer from the entertainment nature of its business, and would not encompass injuries an insured might experience even as non-entertainment type business. Specifically, an insured might reasonably conclude that the Endorsement excludes coverage for injuries which may arise from the substantive content of its entertainment activities rather than from an insured’s application of its own identifying mark on its line of products, even if those products are entertainment in nature.” (*Id.* at p. 4.)

Moreover, the De Leon complaint did not specifically allege what the defamatory statements were or in what context they were made. In *Golden Eagle Ins. Corp. v. Rocky Cola Cafe, Inc.* (2001) 94 Cal.App.4th 120, 126, the court held that even though a

defamatory statement arose out of the insured's business that did not mean it was an employment-related act within the meaning of that exclusion.

Under AIC's and the court's interpretation, all personal and advertising injury would be eliminated as being incidentally related to Tool's music, meaning such coverage is illusory. (See *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 765 [An exclusion should not render promised coverage illusory as contracts should be interpreted in a manner that makes them reasonable and capable of being carried into effect].) AIC suggests the EIE does not eviscerate coverage because the coverage never existed. But Coverage B of the Policy states it does. AIC argues that a policy provision is not illusory where at least one conceivable claim would be covered. (See *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 836.) As an example, AIC posits that if Paul D'Amour, Tool's former bassist, sued Justin Chancellor, Tool's current bassist, alleging Chancellor defamed D'Amour on his personal Twitter account by stating D'Amour was too washed up to play for Tool, such a statement would not arise from Tool's exploitation of its music, but instead would arise from a personal statement by a named insured and would not fall within the EIE. We disagree; such a statement would fall within the court's broad definition of being incidental to Tool's music. AIC's hint that Tool could have paid to remove the EIE does not change the fact the Policy was illusory.

The evisceration of coverage if the court's interpretation is used indicates the parties did not intend the exclusion to be read so expansively. (*Church Mutual Ins. Co. v. U.S. Liability Ins. Co.* (S.D.Cal. 2004) 347 F.Supp.2d 880, 886.) ““It is a basic principle of insurance contract interpretation that doubts, uncertainties and ambiguities arising out of policy language ordinarily should be resolved in favor of the insured in order to protect his reasonable expectation of coverage.”” (Italics deleted.) (*Ibid.*) Tool had a reasonable expectation it would have the coverage for advertising injury for which it had paid.

Accordingly, we conclude that the trial court failed to narrowly interpret the EIE and that the EIE only excludes personal and advertising injury that results from Tool's

music, but not personal and advertising injury that results from what is displayed on merchandise. The advertising injuries alleged in the FAC arose from the exploitation, distribution or exhibition of Tool's merchandise not from the exploitation, distribution or exhibition of Tool's music. Thus, the alleged injuries did not originate from Tool's music, but from its merchandise such that any connection to Tool's music was too attenuated to fall under the EIE.

### *C. The Prior Publication Exclusion*

The prior publication exclusion stated: "Personal and advertising injury arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

The court found that the allegation that "[b]etween 1991 and 2002 [DeLeon] created at least ten works of visual art which are protected by federal copyright law" created the potential that one of the works might have been first published during the AIC Policy period. AIC asserts that a careful examination of the FAC and the attached exhibits conclusively establishes that all of the De Leon art was first published prior to the AIC Policy period so that its duty to defend was not triggered. Even if AIC is correct, the defamation allegations remain, meaning there was still a potential for coverage. Given the potential coverage under Coverage B, we also need not address whether there was a potential for coverage under Coverage A.

### *III. Leave to Amend*

Tool contends the court abused its discretion when it denied Tool leave to file an amended cross-complaint to include another cross-defendant (National Surety) and to add additional bad faith allegation against AIC and when it denied Tool's Code of Civil Procedure section 473, subdivision (b) motion for relief from the former ruling. AIC responds that Tool failed to file a timely appeal from the denial of leave to amend because that order had the effect of deciding all issues between Tool and National Surety; that order did not decide all the issues between Tool and AIC. Tool timely appealed from the order disposing of the case against AIC. AIC then asserts an appeal from the order



denying relief was premature because there was no final judgment between Tool and St. Paul; there was a final order between Tool and AIC. AIC presents no argument in support of the court's rulings.

“Motions for leave to amend are directed to the sound discretion of the judge: ‘The court may, in furtherance of justice and on any terms as may be proper, allow a party to amend any pleading. . . .’ (Code Civ. Proc., § 473, subd. (a)(1).) However, the court’s discretion will usually be exercised liberally to permit amendment of the pleadings. The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified. ‘Leave to amend should be denied only where the facts are not in dispute, and the nature of the plaintiff’s claim is clear, but under substantive law, no liability exists and no amendment would change the result.’” (Citations omitted.) (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.)

The court denied Tool’s motion for failing to comply with the mandatory provisions of rule 3.1324; the court expressly stated: “The declaration submitted along with the motion fails to specifically indicate when the facts giving rise to the amended allegations were discovered [Rule 3.1324(b)(3)] and even fails to rationally explain why the request was not made earlier [Rule 3.1324(b)(4)].”

The declaration of Tracy B. Rane, one of Tool’s attorney, was attached to the motion. Rane stated that on October 5, 2009, AIC sent Tool a full copy of the National Surety policy as well as endorsements to the AIC Policy previously unseen by Tool. Rane stated that prior to October 5, 2009, Tool never had a complete copy of the National Surety policy and did not know whether that policy provided coverage for the underlying action. Tool has not appealed (and cannot timely appeal ) from the part of the order denying its motion to add National Surety as a cross-defendant, only the part denying leave to add additional bad faith allegations against AIC.

Rane also asserted that Tool was not aware of the facts supporting the additional bad faith allegations until AIC produced the copies of the sequential endorsements to its

Policy that revealed Tool and Tool Dissectional, LLC were named insureds contrary to AIC's prior representation to the court, which resulted in a summary judgment being entered against those insureds. Given that counsel waited only two months after learning of the additional facts to file Tool's motion for leave to file a TACC, we conclude that the court abused its discretion when it denied the motion. We will direct the court to vacate its order denying Tool's motion to file a TACC and grant Tool leave to file a TACC containing the additional bad faith allegations against AIC, but not to add National Surety. Accordingly, we need not address Tool's contention that the court abused its discretion when it denied Tool's motion for relief.

#### *IV. Amicus Curiae*

Clarendon filed an amicus curiae brief on its own behalf asserting that because its policy provisions are the same as those in the AIC Policy, this court should order that the trial court's order that AIC did not have a duty to defend should be modified to add that Clarendon also did not have a duty to defend. Having found AIC had a duty to defend, we decline Clarendon's request.

#### **DISPOSITION**

The order finding AIC had no duty to defend is reversed. The order denying Tool leave to file a TACC is reversed with directions to enter an order allowing Tool to file a TACC alleging additional bad faith allegations against AIC, but not to add National Surety as a cross-defendant. Tool to recover costs on appeal.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**JACKSON, J.**